IN THE

SUPREME COURT OF THE UNITED STATES.

200

OCTOBER TERM, 1948.

FLOYD G. AFFOLDER,
Petitioner,
v.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

No. 200

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Floyd G. Affolder and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered and entered on the 10th day of May, 1949 in this case lately pending in said Court of Appeals, entitled New York, Chicago and St. Louis Railroad Company, a corporation, Appellant, v. Floyd G. Affolder, Appellee, being Cause No. 13,858 of causes on the docket of said Court of Appeals, reversing

the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, in said cause, in favor of your petitioner and against the respondent herein, on the ground that the District Court erred in charging the jury, and remanding said cause to said District Court for a new trial.

OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals in said cause, which petitioner here seeks to have reviewed, appears on pages 201 to 214, inclusive, of the printed transcript of the record filed herewith. Said opinion has not as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by petitioner, Floyd G. Affolder, against respondent, New York, Chicago and St. Louis Railroad Company, a corporation, on the 19th day of February, 1948 (R. 2), in the United States District Court for the Eastern District of Missouri, Eastern Division, under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-60) and the Federal Safety Appliance Act (45 U. S. C. A., Sec. 2), to recover damages for personal injuries sustained by petitioner who, on September 24, 1947, while in respondent's employ as a switchman, was run over and injured by a car moving in respondent's switching yard in Fort Wayne, Indiana.

Petitioner, plaintiff in said District Court, alleged in his complaint that the respondent railroad company, defendant below, was at all times mentioned in the complaint engaged in interstate commerce and that a part of petitioner's duties was in furtherance of interstate commerce; that on said September 24, 1947, petitioner was a member of a switching crew engaged in switching cars on re-

spondent's tracks in said yard, and that while he was so engaged and discharging his duties in the course and scope of his employment, two of said cars failed to couple automatically by impact, and that by reason of such failure a cut of cars was caused to move on one of said tracks and one of said cars was caused to strike and run over petitioner; that respondent was hauling on its lines said cars which were not equipped with couplers coupling automatically by impact, in violation of said Safety Appliance Act, and that petitioner's injuries were directly caused by said violation of said Act (R. 2-4).

Respondent, by its answer, admitted it was engaged in interstate commerce and that a part of petitioner's duties were in the furtherance of interstate commerce, and denied the averments of the complaint relating to the alleged violation of the Safety Appliance Act (R. 5).

As appears from the evidence and proceedings at the trial of the cause in the District Court, before the court and a jury, Affolder, this petitioner, was the member of respondent's switching crew in said yard known as the "field man," whose duty it is to throw switches and see that brakes are set when necessary, as distinguished from the "head man," the switchman who follows the engine and lifts pins, opens the knuckles of couplers and cuts cars off from the engine (R. 21, 22). Plaintiff was injured on the eastbound main track, a straight track extending east and west through these yards, which held about forty-four cars between switch points (R. 22). Cars were being distributed on the various tracks. The first group of cars placed on the eastbound main, consisting of six or seven cars, was shoved down some considerable distance eastwardly on the track after having been coupled together, and petitioner "tied down" the brake on the first car (R. 41). The eastbound main lay immediately north of Track No. 11, the tracks south of it being numbered 11,

10, 9, 8, 7, etc. (R. 23). After the shoving down, eastwardly, of the group of six or seven cars on the eastbound main, other cars were kicked down that track until there were twenty-five of them, coupled together, the last car, the one farthest west, being the Rock Island box car referred to in the evidence (R. 41-43). The Rock Island car was kicked down separately and coupled to the car in front of it (R. 42, 43). The next car, the one that went down to join the Rock Island car, was the Pennsylvania hopper car referred to in the evidence (R. 43). Tielker, the head brakeman, had charge of these movements. As petitioner's witness he testified that when he sent down the Pennsylvania hopper car on the eastbound main, the twenty-sixth car, he opened the knuckle of the coupler on the east end of the car (R. 43). He said the knuckle on the west end of the Rock Island car was also open but that impact of the car with the car ahead of it could have closed the knuckle (R. 47). In attempting a coupling, if, when the two couplers come together, both have closed knuckles they will not couple automatically by impact; but if one knuckle is open and one closed, or both open, the coupling should be made automatically (R. 44). Tielker further testified that he kicked this Pennsylvania car down hard enough to have it join onto the cars ahead (R. 45); and that after he had opened the knuckle at the east end of the car the coupler was in "good normal operating position" (R. 52).

After the Pennsylvania car was sent down against the Rock Island car, two other cars were kicked down the eastbound main, making the twenty-seventh and twenty-eighth cars. Each of them coupled on impact to the car ahead of it; and then a shoving movement was made by the engine, shoving the whole train together (R. 57, 58). Following this, the Rock Island car, to which the Pennsylvania car had not coupled on impact, separated from

the Pennsylvania car, and the entire cut of cars east of the Pennsylvania car began to roll eastwardly down the track; the slope of the yard being down hill, from west to east. At that time, which was about 3 o'clock a. m., petitioner was working on track No. 7, south of the eastbound main, and when he observed that the cars east of the Pennsylvania hopper car were rolling eastwardly down the eastbound main he ran to that track to undertake to stop the movement (R. 23, 24). It was his duty to run over to the moving cars in order to stop them (R. 36); his instructions were to apply brakes on any cars that were rolling away down at the other end of the yard (R. 38). Petitioner ran to the eastbound main and undertook to board the last car of the moving cut of cars, that is, the Rock Island car (R. 24, 33). When he was approximately two feet away from the car he stepped on an object that rolled and threw him toward the car. He made an attempt to grab the ladder but his hand slipped off and he fell beneath the car, sustaining the injuries for which he sues (R. 24).

The pertinent portions of the charge of the District Court to the jury are set out in the opinion of the Court of Appeals (R. 205-210) and are as follows:

> "Now, bear in mind, that these instructions are given to you as a whole. Don't attempt to separate them and use part of them in determining the issues and disregarding the remainder, because in that way your verdict would not be applicable. They are given to you for use and application to the case and to guide you in your deliberations as a whole, and I hope as a whole that they will be intelligible to you.
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>
> "This case is based upon a charge by the plaintiff that the defendant failed to comply with the federal

law, or a federal statute, known as the Federal Safety Appliance Act, and, briefly, this law prohibits all railroads operating in interstate commerce to use any car in interstate commerce that is not equipped with couplers which couple automaticallly on impact.

"It is the position of the plaintiff in this case, as I understand the record, that on the occasion in question, the 24th day of September, of last year, he was a brakeman in the defendant's yard; that on this main east and west track there was a separation of the cars on that track. The number of the two cars where the separation occurred were given to you, but I prefer to use the names of the cars, because I think that is much easier for you to remember. One of the cars was referred to as a Pennsylvania car, and another car was referred to as a Rock Island car; and between these two cars the coupling, for some reason, and that is for you to determine, was not connected, and they separated, and the string of cars to the east of the break, some twenty-five cars started a movement to the east, and the plaintiff, who was some four or five tracks to the south of the track upon which this movement was located, some 3:00 o'clock in the morning, the search lights in the yards, some evidence about the obscuring of vision by beam or smoke from cranes, but he saw the movement of these cars start to the east.

"As I recall his testimony, he said that he hurried over there, and that he reached a point very close to the car that he intended to get on; I believe he said some two or three feet; that is not exactly material, whether it was two or three feet, but anyhow, for some reason, so he testified, his foot stepped on some object, or for some reason he slipped, or fell, when he was attempting to board the car, and his leg passed

over the rail, under the wheel, and received injuries which caused this amputation.

"He testified that he was going to the car to get on it for the purpose of setting the brake and stopping the movement of the car.

"Now, it is the position of the plaintiff, as I understand it, that the separation of the cars which started this movement which the plaintiff testified he was going to attempt to stop, and which he testified was a part of his duties, it is the position of the plaintiff that the separation was due to the failure of the defendant to equip the cars with couplers that couple automatically on impact. And that, second, the failure that I have just referred to was the proximate cause of the plaintiff's injuries.

"Now, on the other hand, as I understand it to be the position of the defendant, no denial but what there was a separation of cars, but the defendant denies that the separation was due to any failure on its part to equip or that the cars were being used without being equipped with couplers which couple automatically on impact. And, second, that regardless of what caused those two cars to separate, it is further the position of the defendant that the failure of the cars to remain together, or, I might put it, a separation of the cars, was not the proximate cause of the plaintiff's injuries.

"Now, that, as I understand it, states the respective positions of the parties. So the case resolves itself down to a very simple issue: a decision on two questions by you:

"Did the defendant use cars in interstate commerce on the occasion in question that were not equipped with couplers that coupled automatically on impact, first?

"Second, if the defendant violated the statute in the respect I have just referred to, was such violation the proximate cause of the plaintiff's injury?

• • • —• • • •

"Under the law as I have referred to, in this case the defendant had an absolute and continuing duty not to haul or use on its lines any car not equipped with couplers coupling automatically on impact. And it was not only the duty of the defendant to provide such couplers, but it was under the further duty to keep them in such operative condition that they would always perform their function.

"The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact.

"Now, I charge you in this case that if you find and believe from the evidence that at the time and place mentioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple automatically on impact, and that by reason thereof a separation occurred between the Pennsylvania hopper car and the Rock Island box car, and that said separation was due to a failure on the part of the couplers of either car to function properly and to couple automatically on impact, then in that event you are instructed that the defendant violated the Safety Appliance Act that I have referred to.

"And if you further find and believe from the evidence that such violation, if any, directly and proximately caused, either in whole or in part, plaintiff's injuries and damages, if any he sustained, as referred to in the evidence, then your verdict will be in favor of the plaintiff and against the defendant in this case.

"On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically on impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendant.

"Now, you will understand from what I have said to you that the plaintiff does not found his action and his claim upon negligence upon the part of the defendant; no negligence charged; the charge is a violation of an absolute statutory duty; and under the statute upon which the suit is based, and which I have referred to, if you find there was a breach of such duty, the defendant railroad cannot defend the cars (case) upon the ground that that plaintiff was also negligent, or that the accident was caused by negligenec of some fellow servant of plaintiff, or that plaintiff assumed a risk of any operation engaged in; so the question of negligence upon the part of the plaintiff is not in this case. Any question of contributory negligence upon the part of the plaintiff is not in this case. Any question of negligence of a fellow servant is not in this case. Any question of the assumption of risk by the plaintiff is not in this case. Those matters you should not concern yourselves with in arriving at a verdict in this case.

"But similarly, plaintiff has no right to recover in this suit for any negligence of the defendant, if any has been shown, so you cannot hold the defendant liable in this case for any act or failure to act of Tielker, who said he was a pin man in the engine crew (and as I recall, he testified to opening the coupling

so it would couple on contact to, he said, with the car to which it was being shoved or kicked), or any other employee, or any defect or obstruction in the condition of the yards; that is not in this case.

"Now, I reiterate, the plaintiff charges the defendant with liability in this case based upon the violation of a federal statute, namely, a statute which requires and places the duty upon the defendant that it shall not haul or use cars that are not equipped with couplers that couple automatically on impact. The defendant denies the charge of the plaintiff in this respect.

* * * * * * *

"Now, the burden of proof rests upon the plaintiff to sustain the charge he has made in this case by a preponderance of the evidence, that is, by a greater weight of the evidence, that is, these two propositions: that either the Pennsylvania or the Rock Island car referred to in evidence were not equipped with couplers coupling automatically on impact as required by law, and that the plaintiff's injuries were directly and proximately caused by reason of such failure to equip said cars, or either of them, with the couplers coupling automatically on impact.

* * * * * * *

"* * * More specifically, although you may find that both or either of the cars referred to were not equipped with couplers coupling automatically on impact, as required by the mandate of the statute, plaintiff upon that showing alone cannot recover in this case. The plaintiff must further show that the failure of the couplers to couple automatically upon impact was the proximate cause of his injury. There is liability in a case of this character only if the failure of

the couplers to couple automatically not only create a condition under which, or an incidental situation in which the employee is injured, but it is necessary that be itself the immediate cause of the injury or the instrumentality through which the injury to plaintiff was directly brought about.

"Now, going to this question, which you must pass on: if you should find that the defendant did fail to have the cars mentioned in the evidence, that is, the Pennsylvania car or the Rock Island car, equipped with couplers which coupled automatically on impact, was such failure the proximate cause, in whole or in part, of the plaintiff's injuries?

"In determining this question of what was the proximate cause of the accident and plaintiff's injuries, * * * if you find * * * that the situation was created by failure of couplers to couple automatically on impact, then the failure of the couplers to couple automatically on impact, as required by the statute, could be considered by you as a proximate cause of plaintiff's injuries.

"On the other hand, if you find that plaintiff's action * * * was not the conduct of an ordinary prudent brakeman under the circumstances, * * * then you should find that his injury was the result of his own action, as a new and superseding cause, and that the operation of the cars due to failure of the couplers to couple automatically on impact was not the proximate cause of the accident and plaintiff's injuries" (R. 160-167).

The trial of said cause in the District Court resulted in a verdict and judgment, on June 9, 1948, in favor of petitioner, plaintiff, and against respondent, defendant, in the sum of $95,000.00 (R. 174). Thereafter, on June 16 1948, respondent filed a motion to set aside the verdict

and the judgment entered thereon and to enter judgment for respondent in conformity with its motion for a directed verdict at the close of all the evidence, or, in the alternative, for a new trial (R. 174). And thereafter, on July 28, 1948, respondent's motion for judgment in conformity with its motion for a directed verdict was overruled, and its motion for a new trial was overruled on condition that petitioner remit from the verdict the sum of $15,000.00 (R. 190). Petitioner duly made such remittitur, and thereupon judgment was entered in favor of petitioner and against respondent in the sum of $80,000.00 (R. 190, 191). In passing upon said motions, the District Court filed an opinion (R. 177-190) reported in 79 Fed. Supp. p. 365.

Thereafter respondent, in due course, appealed said cause to the United States Court of Appeals for the Eighth Circuit (R. 194) where said appeal was duly perfected, and the cause was, on the 9th day of March, 1949, argued by counsel and submitted upon argument and briefs of counsel, and was taken under advisement by the Court (R. 200). Thereafter, on May 10, 1949, said Court of Appeals filed an opinion in said cause (R. 201) wherein the court held that the District Court's charge to the jury was prejudicially erroneous. The Court's grounds for condemning the charge cannot be adequately shown here without quoting from the opinion. After stating that the charge must be considered in its entirety (R. 210), the Court of Appeals said:

> "We find no difficulty in reaching the conclusion that the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically on impact. And the court properly instructed the jury that proof of the separation of the cars would support a finding that the Act had been violated. The diffi-

culty arises from the rather strong inference created by the charge that all the jury need find to reach a verdict for plaintiff was that the cars did separate. We are unable to escape the conclusion that the instruction was not sufficiently clear and definite in that respect. It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty and therefore could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes. Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases but is especially true in cases such as this where only one circumstance is relied upon to support the inference. Plaintiff's counsel made the argument to the jury that:

"'The plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact. That is all there is to it, in so far as that particular phase of the case is concerned. I hope I make myself clear on that.'

"The instruction following that argument, that under the law the defendant had an absolute and continuing duty not to use any car which was not equipped with couplers coupling automatically on impact and maintained in such operative condition that they would always perform their function and that plaintiff was not required to prove more than that 'any coupler did in fact fail to couple automatically by im-

pact', very probably gave the jury the impression that since that was all plaintiff need show, that was all the jury need find. If it did get that impression, consideration of other possible causes for the separation was eliminated because it was undisputed that the couplers did not couple these two cars.

"The trial court was of the opinion, expressed in a memorandum opinion in ruling on the motion for a new trial, **Affolder v. New York, C. & St. L. R. Co.**, 79 F. Supp. 365, that the injunction given to the jury that it must find that the separation 'was due to a failure on the part of the couplers of either car **to function properly** and to couple automatically on impact', taken with the further charge that if the jury found that the separation was due to some other cause and that 'a failure to provide couplers coupling automatically by impact did not cause it', was sufficient to prevent any misunderstanding. We are unable to agree. The initial reaction from the entire charge is an impression that all that was necessary for the jury to find to reach the conclusion that there was a violation of the Act was that there was a separation. The bare intercalation of the words 'to function properly' would not be likely to remove it. Nor do we think that telling the jury that their verdict should be for defendant if it found 'a failure to provide couplers coupling automatically by impact did not cause the separation' did so. The couplers did not couple automatically on impact. That was a self-evident conceded fact. We are of the opinion that the jury could well have understood the charge taken as a whole to mean that since the couplers did not couple automatically on impact, since defendant had the absolute duty to furnish cars with couplers that did do so, the fact that these did not do so conclusively established defendant's violation of its

duty to furnish cars with couplers that did" (R. 210-212).

And on said 10th day of May, 1949, the Court of Appeals entered judgment in said cause in accordance with the above mentioned opinion, reversing the judgment of the District Court and remanding the cause to that court for a new trial (R. 214).

Thereafter, on the 24th day of May, 1949, and within the time allowed therefor by the rules of said Court of Appeals, petitioner duly filed in said cause, in said Court of Appeals, his petition for a rehearing of said cause (R. 215-224).

And thereafter, on the 9th day of June, 1949, petitioner's said petition for a rehearing of said cause was by said Court of Appeals denied, whereby and on which day said judgment of the Court of Appeals in said cause became final (R. 225).

The duly certified record, including all of the proceedings of said cause in said District Court and in said Court of Appeals is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon New Title 28, United States Code (Judiciary and Judicial Procedure), Section 1254, being a revision of Section 240 (a) of the former Judicial Code as amended (Title 28, U. S. C. A., Sec. 347) providing for review by this Court, by certiorari, of cases in the United States Courts of Appeals.

Such jurisdiction is exercised by this Court not only where the Court of Appeals finally disposes of the case, but where it reverses a judgment and remands the cause for a

new trial, if such ruling is erroneous and the matter involved is fundamental to the further conduct of the case and vital to the trial of other like cases.

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590;
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117;
United States v. General Motors Corporation, 323 U. S. 373, l. c. 377, 89 L. Ed. 311, l. c. 318.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for writ of certiorari are:

1.

Whether, in this case, an action for the violation by respondent of Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2), where petitioner's injury came about because of the separation of two cars that did not couple automatically by impact, and where the trial court's charge as a whole "made clear to the jury that defendant's liability depended upon its failure to equip its cars with couplers coupling automatically on impact," as the Court of Appeals held (R. 210), and repeatedly instructed the jury that to find for plaintiff the jury must find that defendant failed to have its cars mentioned in the evidence, or one of them, equipped with couplers coupling automatically on impact, and that such failure was the proximate cause of plaintiff's injuries (R. 161-166), the Court of Appeals erred in holding the charge prejudicially erroneous on the ground that language therein contained might create the inference, or give the impression, that all the jury needed to find, to reach the conclusion that there was a violation of the Safety Appliance Act, was that the cars in question separated (R. 210, 211).

2.

Whether, under the circumstances of this case, where there was positive, direct proof that the knuckle of the coupler on the east end of the Pennsylvania car was opened by the head switchman and the coupler put in good normal operating position, but the car, nevertheless, failed to effect a coupling with the Rock Island car on impact (R. 45, 52), resulting in the subsequent separation of those cars, and the trial court's charge "made clear to the jury that defendant's liability depended upon its failure to equip its cars with couplers coupling automatically on impact" (R. 210), and repeatedly instructed the jury that in order to find for petitioner the jury must find that respondent was using on its lines a car or cars not equipped with couplers coupling automatically by impact, the Court of Appeals erred in condemning the charge as prejudicially erroneous on the ground:

> "It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty, and, therefore, could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes."

3.

Whether, under the circumstances of this case as shown by the immediately preceding paragraph hereof, the Court of Appeals erred in condemning the charge as prejudicially erroneous on the ground:

> "Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence it is ordi-

narily essential that the effect of the evidence and its proper use be explained. It is not only true in res ipsa cases, but is especially true in cases such as this one where circumstance is relied upon to support the inference."

4.

Whether the Court of Appeals erred in holding that the argument of plaintiff's counsel to the jury that "the plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make, or did not come together by impact" (R. 137), taken together with the trial court's instructions to the effect that defendant had an absolute and continuing duty not to use any car which was not equipped with couplers coupling automatically on impact and to keep such couplers in such operative condition that they would always perform their function, and that plaintiff was not required to prove more than that any such coupler did in fact fail to couple automatically by impact (R. 163-165), constituted prejudicial error.

5.

Whether, in condemning the charge of the District Court as insufficient and erroneous, the Court of Appeals erred in failing to apply the settled rule that under the Safety Appliance Act it is the mandatory duty of an interstate carrier by railroad not only to equip its cars with couplers coupling automatically on impact but to keep and maintain such couplers in good operating working condition at all times, and that, therefore, proof that couplers on a fair trial failed to couple automatically by impact constitutes direct proof of a violation of the statute.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

Since, as the Court of Appeals held (R. 210), the District Court, by its charge, "made clear to the jury that defendant's (respondent's) liability depended upon its failure to equip its cars with couplers coupling automatically on impact," and the charge repeatedly required the jury to find, as a predicate of liability, that respondent failed to have its cars or one of them so equipped and that such failure was the proximate cause of petitioner's injuries (R. 161-166), the Court of Appeals erred in holding the charge prejudicially erroneous on the ground that language therein contained might create the inference or give the impression that all the jury needed to find to reach a verdict for petitioner was that the cars in question separated.

Such ruling is in direct conflict with the following among other decisions holding that in determining whether any prejudicial error was committed below in charging the jury, the charge must be considered as a whole with the view of determining the impression thereby conveyed to the jury. Grand Trunk Western R. Co. v. H. W. Nelson Co. (6th Cir.), 116 F. (2) 823, 835; Carter v. Atlanta & St. A. B. Ry. Co. (5th Cir.), 170 F. (2) 719, 721; Moran v. City of Beckley (4th Cir.), 67 F. (2) 161, 164.

The Court of Appeals rendered lip service to this rule (R. 210) but erroneously failed to apply it when the situation plainly called for its application.

2.

Since there was direct proof that prior to sending down the Pennsylvania car to couple onto the Rock Island car, Tielker opened the knuckle on the east end of the Pennsylvania car, and that the coupler was then in good normal operating condition but nevertheless failed to effect a coupling on impact (R. 45, 52), and the trial court's charge "made clear to the jury that defendant's liability depended upon its failure to equip its cars with couplers coupling automatically on impact" (R. 210), and the jury was repeatedly instructed that to find for petitioner the jury must find that respondent was hauling and using on its line a car or cars not equipped with couplers coupling autimatically by impact and that the failure to have said car or cars so equipped was the proximate cause of plaintiff's injuries (R. 161-165), the Court of Appeals erred in condemning the charge as prejudicially erroneous on the following ground:

> "It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty, and, therefore, could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes."

In so holding, the Court of Appeals obviously lost sight of the law applicable to the situation in hand. The fact that the Pennsylvania car, after the coupler thereof had been properly prepared for coupling, failed to couple to the Rock Island car automatically on impact, constituted direct proof of a violation of the statute by respondent; and it was sufficient for the District Court, by its charge,

to require the jury to find, on this proof, that "defendant was hauling or using on its lines one or more cars equipped with couplers which did not couple automatically on impact" (R. 163). It was proper to so submit the simple issue involved in the very language of the statute. **Atchison, T. & S. F. Ry. Co. v. Keddy** (9 Cir.), 28 F. (2) 952, 955. The words of the statute are plain and unambiguous. "**Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance.**" **St. Louis, I. M. & S. Ry. Co. v. Taylor**, 210 U. S. 281. 294, 295, 52 L. Ed. 1061.

Said ruling of the Court of Appeals is in direct conflict with the following, among other, applicable decisions of this Court, holding that Section 2 of the Safety Appliance Act (Title 45 U. S. C. A.) imposes upon interstate carriers by railroad the **absolute unqualified duty** to provide every car with couplers coupling automatically by impact **and to keep and maintain such couplers in good working condition at all times and under all circumstances. Myers v. Reading Co.**, 331 U. S. 477, 91 L. Ed. 1615; **Delk v. St. Louis & S. F. R. Co.**, 220 U. S. 580, 55 L. Ed. 590; **St. Louis, I. M. & S. R. Co. v. Taylor**, 210 U. S. 281, 52 L. Ed. 1061; **Chicago, R. I. & P. R. Co. v. Brown**, 229 U. S. 320, 57 L. Ed. 1204; **Minneapolis & St. Louis R. Co. v. Gotschall**, 244 U. S. 66, 61 L. Ed. 445; **San Antonio & A. P. R. Co. v. Wagner**, 241 U. S. 476, 60 L. Ed. 1110.

And said ruling is in direct conflict with the following, among other, decisions of other Courts of Appeal holding that the test of the observance of this duty is the performance of the appliance; that proof of the failure of a coupler at any time to properly function so as to effect a coupling on impact constitutes proof that the carrier was then and there hauling on its line a car not equipped with couplers coupling automatically on impact as the Act requires,

viz.: **Atchison, Topeka & Santa Fe Ry. Co. v. Keddy** (9th Cir.), 28 F. (2) 952, 965; **Philadelphia & R. Ry. Co. v. Eisenhart** (3rd Cir.), 280 Fed. 271, 276; Cert. denied 260 U. S. 723, 67 L. Ed. 482; **Philadelphia & R. Ry. Co. v. Auchenbach** (3rd. Cir.), 16 Fed. (2) 550, 552; Certiorari denied 273 U. S. 761, 71 L. Ed. 878.

3.

Though the evidence established, without contradiction, that prior to the movement of the Pennsylvania car the knuckle of the coupler on the east end thereof was opened by Tielker and the coupler properly prepared for coupling with the Rock Island car, that the coupler was then in good operative position but, nevertheless, failed to couple automatically by impact, and on this proof the District Court charged that to find for plaintiff the jury must find that defendant was hauling or using on its lines a car or cars not equipped with couplers coupling automatically by impact, the Court of Appeals further condemned the charge in the following language:

> "Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases but is especially true in cases such as this where only one circumstance is relied upon to support the inference" (R. 211).

This ruling entirely overlooks the well established rule that in actions under the coupler provision of the Safety Appliance Act the failure of a coupler at any time to efficiently perform its function when operated in the usual, customary manner, so as to effect a coupling automatically by impact, establishes a violation of the Act in that it constitutes proof that the carrier was then and there hauling on its line a car not equipped with couplers coupling auto-

matically by impact in violation of the statute. **Atchison, T. & S. F. Ry. Co. v. Keddy**, 28 Fed. (2) 952, l. c. 955; **Chicago, M. St. P. & P. R. R. Co. v. Linehan**, 66 F. (2) 373. Here the Court of Appeals erroneously treated the failure of the coupler to couple on impact, though properly prepared for coupling, as mere circumstantial evidence of the violation of the statute; and on that premise held that it was "essential that the effect of the evidence and its proper use be explained," as would be proper by instructions in a res ipsa loquitur case.

This we submit is plainly erroneous. There was neither occasion nor room legally for the making of any such explanation by the trial court. Any such explanation as suggested by the Court of Appeals, likening this case to a res ipsa loquitur case, could have served only to breed confusion.

And in this respect the decision of the Court of Appeals is directly in conflict with the decisions of this Court in **Delk v. St. Louis & S. F. R. Co.**, 220 U. S. 580, 55 L. Ed. 590; **Chicago, B. & Q. R. Co. v. United States**, 220 U. S. 559, 55 L. Ed. 582; **St. Louis, I. M. & S. R. Co. v. Taylor**, 210 U. S. 281, 52 L. Ed. 1061, and other decisions of this Court cited above, and is in conflict as well with the following, among other, decisions of other Courts of Appeals, namely: **Atchison, Topeka & Santa Fe Ry. Co. v. Keddy** (9th Cir.), 28 F. (2) 952, 955; **Philadelphia & R. Ry. Co. v. Eisenhart** (3d Cir.), 280 Fed. 271, 276; **Philadelphia & R. Co. v. Auchenbach** (3d Cir.), 16 Fed. (2) 550, l. c. 552, certiorari denied 273 U. S. 761, 71 L. Ed. 878; **Chicago, M. St. P. & P. R. R. Co. v. Linehan**, 66 F. (2) 373.

4.

The Court of Appeals in its opinion (R. 211) set out the following argument of petitioner's counsel at the trial (not objected to below), namely:

"Plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact. That is all there is to it, in so far as that particular phase of the case is concerned. I hope I make myself clear on that" (R. 137).

The Court then referred to the District Court's instructions that under the law the defendant had an absolute and continuing duty not to use any car not equipped with couplers coupling automatically on impact and to maintain such couplers in such operative condition that they would always perform their function, and that plaintiff was not required to prove more than that "any coupler did in fact fail to couple automatically by impact," and held that the argument and these instructions, taken en masse, constituted prejudicial error (R. 211). In so doing the Court, we submit, committed further error.

The argument of counsel was quite proper. It is indeed true that to find that respondent violated the Act all the jury needed to find was that the couplers on this occasion, "**when put in position to operate properly,**" did not effect a coupling automatically by impact. Myers v. Reading Co., 331 U. S. 477, 91 L. Ed. 1615; Atchison, Topeka & Santa Fe Ry. Co. v. Keddy (9 Cir.), 28 F. (2) 952, 955; Chicago, M., St. P. and P. R. R. Co. v. Linehan, 66 F. (2) 373; Philadelphia & R. Ry. Co. v. Auchenbach (3 Cir.), 16 F. (2) 550, 552.

The trial court's instruction as to the mandatory duty laid upon the carrier by the automatic coupler provision of the Safety Appliance Act is squarely within the law stated above, as often declared by decisions of this Court.

What is said by the Court of Appeals in this connection regarding the trial court's instruction as to what petitioner

was required to prove has reference to the following paragraph of the charge:

> "The plaintiff, in order to discharge the burden of proving a breach of the defendant's duty, is not required to prove the existence of any defect in any such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact" (R. 163).

Surely the jury could not possibly have been misled by that paragraph. The undisputed testimony adduced was that cars will not couple automatically by impact unless at least one coupler knuckle is open, and that upon this occasion one of the couplers had been opened and prepared for coupling. When told that plaintiff "need only prove that any such coupler did in fact fail to couple automatically by impact," no juror could have failed to understand that this paragraph meant that plaintiff need only prove that any coupler, after having been properly prepared for coupling, failed to couple automatically by impact. If the jury believed that Tielker opened this knuckle, then the failure to couple on impact—which was undisputed—established a violation of the Act.

5.

The United States Court of Appeals for the Eighth Circuit, by its said opinion and judgment in this cause, has denied this petitioner a right specifically set up and claimed by him and to which he is entitled under the Federal law, namely: The right to have the judgment below in his favor affirmed, since the evidence concededly warranted the submission of the case to the jury and the trial was free from prejudicial error.

This case, in our judgment, is one calling loudly for the issuance of this Court's writ of certiorari. Said ruling

of the Court of Appeals not only deprives this petitioner of the fruits of a judgment lawfully obtained by him below, but, if permitted to stand, will result in the utmost confusion in the matter of instructions to the jury on a retrial of this case and in the trial of other cases for the violation of the Safety Appliance Act as well. **Delk v. St. Louis & San Francisco R. Co.**, 220 U. S. 580, 55 L. Ed. 590; **United States v. General Motors Corporation**, 323 U. S. 373, 377, 89 L. Ed. 311, 318. And it follows that the opinion, if allowed to stand, must inevitably result in depriving railroad workers of proper jury trials in actions under the Act. Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 354; Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 602.

PRAYER FOR THE WRIT.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Court of Appeals for the Eighth Circuit to the end that said opinion and judgment of said Court of Appeals in said cause of New York, Chicago & St. Louis Railroad Co., a corporation, Appellant, v. Floyd G. Affolder, Appellee, No. 13858 in said Court of Appeals, be reviewed by this Court as provided by law, and that the judgment of the United States Court of Appeals for the Eighth Circuit in said cause be reversed and the judgment of the District Court therein be affirmed, and that petitioner have such other relief as to this Court may seem meet and proper.

MARK D. EAGLETON,
WILLIAM H. ALLEN,
Attorneys for Petitioner.

BRIEF

In Support of Petition for Certiorari.

The statement of the grounds of jurisdiction, reference to the opinion below, and the statement of the case, required by Rule 27, are all set out in the foregoing petition for certiorari, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ASSIGNED ERRORS TO BE URGED.

The Court of Appeals for the Eighth Circuit, in its opinion in this cause, erred:

1. In holding and deciding that, though the District Court's charge made clear to the jury that respondent's liability depended upon its failure to equip its cars with couplers coupling automatically by impact, the charge was, nevertheless, prejudicially erroneous on the ground that specific language therein contained might create the inference or give the impression that to reach a verdict for petitioner the jury needed only to find that the Pennsylvania car and the Rock Island car separated (R. 210, 211).

2. In holding and deciding that the District Court's charge was prejudicially erroneous on the ground that it contained no explanation of the legal effect and permissible use of the proof that the Pennsylvania car, after the knuckle of the coupler at the east end thereof had been opened and the coupler prepared for coupling, failed to couple to the Rock Island car automatically on impact (R. 211).

3. In holding and deciding that the failure of the Pennsylvania car to couple to the Rock Island car automati-

cally on impact constituted mere circumstantial evidence of the violation of the Safety Appliance Act, and that, therefore, it was essential that the effect of this evidence and its proper use be explained by the charge in such manner as would be appropriate in a res ipsa loquitur case.

4. In holding that the argument of petitioner's counsel to the jury that "the plaintiff's duty is satisfied so long as you find that the couplers on this occasion when put in position to operate properly did not make, or did not come together, by impact" (R. 137), taken together with the trial court's instructions to the effect that defendant had an absolute and continuing duty not to use any car not equipped with couplers coupling automatically on impact and to keep such couplers in such operative condition that they would always perform their function and that plaintiff was not required to prove more than that any such coupler did in fact fail to couple automatically by impact, constituted prejudicial error (R. 211).

5. In reversing the judgment below and remanding the cause for a new trial, thereby depriving petitioner of a right to which he is entitled under the Federal law, namely, the right to the benefit of a judgment rendered below in his favor where the evidence plainly showed a violation by respondent of the Safety Appliance Act proximately causing petitioner's injury, and where the trial below was free from prejudicial error.

SUMMARY OF THE ARGUMENT.

I.

A charge which makes clear to the jury the facts to be found in order to return a verdict for the plaintiff cannot lawfully be condemned on appeal by picking out and criticizing isolated portions thereof.

Southern Ry. Co.—Carolina Division v. Bennett, 233 U. S. 80, 58 L. Ed. 860;
Grand Trunk Western R. Co. v. H. W. Nelson Co. (6 Cir.), 116 F. (2) 823, 835;
Carter v. Atlanta & St. A. B. Ry. Co. (5 Cir.), 170 F. (2) 719, 721;
S. S. Kresge Co. v. McCallion (8 Cir.), 58 F. (2) 931.

II.

The ruling of the Court of Appeals that the District Court's charge was prejudicially erroneous on the ground that it contained no explanation of the legal effect and permissible use of the proof that the Pennsylvania car failed to couple to the Rock Island car automatically by impact, is erroneous and in conflict with applicable decisions of this Court and decisions of other Courts of Appeal as shown below:

(1)

The legal effect of the evidence showing that the Pennsylvania car, after the coupler on the east end thereof had been properly prepared for coupling, failed to couple to the Rock Island car automatically by impact, was to constitute proof of the violation of Section 2 of the Safety Appliance Act, in that it furnished direct proof that re-

spondent was then and there using on its line a car not equipped with couplers coupling automatically by impact.

It was consequently sufficient for the District Court, by its charge, to require the jury to find, on this proof, that defendant was hauling or using on its line one or more cars equipped with couplers which did not couple automatically on impact. It was proper to submit this simple issue in the very language of the statute.

San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 480, 60 L. Ed. 1110, 1115;

St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 294, 295, 52 L. Ed. 1061;

Atchison, T. & S. F. Ry. Co. v. Keddy (9 Cir.), 28 F. (2) 952, 955;

Southern Railway Co. v. Stewart (8 Cir.), 119 F. (2) 85.

(2)

In ruling that the District Court's charge was insufficient for lack of explanation as to the legal effect of the proof showing the failure of the Pennsylvania car to couple to the Rock Island car automatically by impact, causing the cars to separate, the Court of Appeals failed to recognize and apply the following well settled rules of law:

(a)

Section 2 of the Safety Appliance Act (Title 45, U. S. C. A., Sec. 2) imposes upon interstate carriers the absolute, unqualified duty to provide every car with couplers coupling automatically by impact and to keep and maintain such couplers in good working condition at all times and under all circumstances.

Myers v. Reading Co., 331 U. S. 477, 91 L. Ed. 1615;

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590;

St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061;

Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 320, 57 L. Ed. 1204;

Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 61 L. Ed. 445;

San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110;

Penn., petitioner v. Chicago and Northwestern Ry. Co., 333 U. S. 866, 92 L. Ed. 1144, 69 S. Ct. 79, reversing Penn. v. Chicago and North Western Ry. Co. (7 Cir.), 163 F. (2) 995.

(b)

The test of the observance by the carrier of this mandatory duty is the performance of the appliance; proof of the failure of a coupler at any time to properly function so as to effect a coupling by impact constitutes direct proof that the carrier was then and there hauling or using on its line a car not equipped with couplers coupling automatically by impact as the Act requires.

Atchison, T. & S. F. Ry. Co. v. Keddy (9 Cir.), 28 F. (2) 952, 955;

Philadelphia & R. Ry. Co. v. Eisenhart (3 Cir.), 280 Fed. 271, 276; Certiorari denied 260 U. S. 723, 67 L. Ed. 482;

Philadelphia & R. Ry. Co. v. Auchenbach (3 Cir.), 16 F. (2) 550, 552; Certiorari denied, 273 U. S. 761, 71 L. Ed. 878.

III.

Petitioner's proof of the violation of the statute did not rest upon mere circumstantial evidence, and the trial court's charge submitting the ultimate issue of fact in the language of the statute is not subject to criticism on the ground that it was "essential that the effect of the evidence and its proper use be explained" (R. 211). The situation called for no further explanation than that made by the trial court, and any attempted further explanation along the lines suggested by the Court of Appeals would have served only to becloud the issues and confuse the jury.

San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110;

Atchison, Topeka & Santa Fe Ry. Co. v. Keddy (9 Cir.), 28 F. (2) 952, 955.

IV.

(1)

The argument of petitioner's counsel to the jury that "plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in proper position to operate properly did not make or did not come together by impact" (R. 137), was entirely proper and not subject to any criticism.

Myers v. Reading Co., 331 U. S. 477, 91 L. Ed. 1615;

Atchison, Topeka & Santa Fe Ry. Co. v. Keddy (9 Cir.), 28 F. (2) 952, 955;

Southern Railway Co. v. Stewart (8 Cir.), 119 F. (2) 85, 87;

Philadelphia & R. Ry. Co. v. Eisenhart (3 Cir.), 280 F. 271, 276;

Philadelphia & R. Ry. Co. v. Auchenbach (3 Cir.), 16 F. (2) 550, 552.

(2)

The trial court's instruction that respondent had an absolute and continuing duty not to use any car not equipped with couplers coupling automatically by impact and to maintain such couplers in such operative condition that they would always perform their function, is directly in keeping with the law as declared in the decisions last above decided.

(3)

And the Court's instruction that petitioner "need only prove that any such coupler did in fact fail to couple automatically by impact," considered in the light of the evidence adduced and all the rest of the charge, could not possibly have served to mislead the jury.

V.

Inasmuch as the ruling of the Court of Appeals anent the charging of a jury in cases such as this is, unsound and out of accord with applicable decisions of this Court and in conflict with decisions of other courts of appeals, and the question as to the propriety of such ruling is not only fundamental to the further conduct of this case but vital to the trial of other like cases, the writ should issue herein in accordance with the Court's practice in such a situation.

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590;
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117;
United States v. General Motors Corporation, 323 U. S. 373, 377, 89 L. Ed. 311, 318.

ARGUMENT.

I.

(1)

This is an action by petitioner to recover damages for personal injuries sustained by him while in the employ of respondent, an interstate carrier by railroad, by reason of the alleged violation by respondent of Section 2 of the Safety Appliance Act; the suit having been brought in the District Court under the Federal Employers' Liability Act (45 U. S. C. A., Section 51).

Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531) provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The trial in the District Court resulted in a verdict and judgment in petitioner's favor. On respondent's appeal to the Court of Appeals for the Eighth Circuit that court rendered an opinion and entered an order reversing the judgment below on the ground that error was committed by the District Court in its charge to the jury.

The facts have been fully set out in petitioner's petition for the writ herein, and for that reason will not be here set forth in detail. We deem it sufficient to call the Court's attention to the fact that the uncontradicted evidence

hows that before the Pennsylvania car was sent down eastwardly on the eastbound main the knuckle of the coupler on the east end thereof was opened by Tielker, the head man, and the coupler put in good, normal, operating position; but that the car did not couple to the Rock Island car automatically by impact, as was intended, resulting later in the separation of these cars by reason whereof petitioner sustained his injuries.

(2)

At the outset of the discussion by the Court of Appeals, in its opinion, of the charge below, the Court said:

> "We find no difficulty in reaching the conclusion that the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically by impact" (R. 210).

Nevertheless, the Court of Appeals ruled that the charge was prejudicially erroneous on the ground that language herein contained might create an inference or give the impression that "all the jury need find to reach a verdict for plaintiff was that the cars did separate"; that, at any rate, the instruction was not sufficiently clear and definite in that respect (R. 210, 211).

Petitioner respectfully submits that this ruling is plainly erroneous, out of accord with the decisions of this Court and in conflict with decisions of other courts of appeals. **A charge which makes clear to the jury the facts to be found in order to return a verdict for the plaintiff cannot be lawfully condemned on appeal by picking out and criticizing isolated portions thereof.** The charge must be considered as a whole with the view of determining the impression thereby conveyed to the jury. Southern Railway

Co., Carolina Division, v. Bennett, 233 U. S. 80, 58 L. Ed. 860; Grand Trunk Western R. Co. v. H. W. Nelson Co. (6 Cir.), 115 F. (2) 823, 835; Carter v. Atlanta & St. A. B. Ry. Co. (5 Cir.), 170 F. (2) 719, 721; S. S. Kresge Co. v. McCallion (8 Cir.), 58 F. (2) 931, 934.

We mean no disrespect to the Honorable Judges of the Court of Appeals when we say that the Court in its opinion rendered lip service to the rule that the charge as a whole must be considered (R. 210), but utterly failed to realize that the application of the rule to the situation here presented would compel a holding that no prejudicial error was committed in the giving of this charge. If, as the Court of Appeals soundly ruled, "the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically by impact," the jury could not conceivably have inferred or deduced from the charge, or any isolated language thereof, that liability on the part of the defendant could arise from the fact alone that the cars separated.

The trial court in its charge time and again instructed the jury that in order to return a verdict for the plaintiff the jury must find that respondent was hauling or using on its lines a car or cars not equipped with couplers coupling automatically by impact, that by reason thereof the separation occurred between the Pennsylvania car and the Rock Island car, and that plaintiff's injuries were thereby proximately caused (R. 162-166).

And the trial court took the pains to tell the jury:

> "Now, bear in mind that these instructions are given to you as a whole. Don't attempt to separate them and use part of them in determining the issues and disregard the remainder, because in that way your verdict would not be applicable" (R. 160).

We respectfully submit that the ruling of the Court of Appeals in this connection is plainly erroneous and in direct conflict with the decisions hereinabove cited.

II.

(1)

The Court of Appeals, in its opinion, after referring to the proof adduced by plaintiff, ruled that the trial court's charge was erroneous, because:

> "It contained no explanation of the legal effect of this proof and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty, and therefore could find this issue for plaintiff on that evidence if the inference arising therefrom was stronger than the proof and inference that the separation resulted from other causes" (R. 211).

In this, we respectfully submit, the Court of Appeals plainly erred. The legal effect of the evidence showing that the Pennsylvania car—after the coupler on the east end thereof had been properly prepared for coupling—failed to couple to the Rock Island car automatically by impact, causing the cars to become separated subsequently, was to constitute proof of the violation by respondent of Section 2 of the Safety Appliance Act, in that it furnished direct proof that respondent was then and there using on its line a car not equipped with couplers coupling automatically by impact. It was consequently sufficient for the District Court, by its charge, to require the jury to find, on this proof, that defendant was hauling or using on its line one or more cars equipped with couplers which did not couple automatically on impact. It was proper to submit this sim-

ple issue in the very language of the statute. And this the District Court did over and over again (R. 162-165).

In San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 480, 60 L. Ed. 1110, 1115, this Court, in affirming a judgment for the plaintiff, summed up the trial court's instructions to the jury in that case as follows:

> "The trial court instructed the jury that if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars, and by reason of this and as a proximate result of it, plaintiff received his injuries, the verdict should be in his favor, otherwise in favor of defendant; and that the burden of proof was upon plaintiff to establish his case by a preponderance of the evidence."

This statement of the Court as to the character of the instructions in the Wagner case, with which no fault was found, serves to show the simplicity of the issues involved in a case such as this, and makes it plain that the charge in the instant case, along the lines of the instructions in the Wagner case, is not subject to criticism on the ground that it should have contained some other and further explanation of the legal effect of the proof that the Pennsylvania car, after the coupler thereon had been properly prepared for coupling, failed to couple automatically on impact.

(2)

In ruling that the district court's charge was insufficient for lack of explanation of the legal effect of the proof showing the failure of the Pennsylvania car to couple to the Rock Island car automatically by impact and "the permissible use which the jury could make of it" (R. 211), the Court of Appeals failed to follow the law as declared

by many decisions of this Court construing and applying the provisions of Section 2 of the Safety Appliance Act.

It is well settled that Section 2 of the Act imposes upon interstate carriers the **absolute, unqualified** duty to provide every car with couplers coupling automatically by impact **and to keep and maintain such couplers in good working condition at all times and under all circumstances.** Myers v. Reading Co., 331 U. S. 477, 91 L. Ed. 1615; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 320, 57 L. Ed. 1204; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 61 L. Ed. 445; San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110.

The test of the observance of the mandatory duty laid upon carriers by the Act is the performance of the appliance. Proof of the failure of a coupler at any time to properly function so as to effect a coupling by impact constitutes direct proof that the carrier was then and there hauling or using on its line a car not equipped with couplers coupling automatically by impact as the Act requires. Atchison, T. & S. F. Ry. Co. v. Keddy (9th Cir.), 28 F. (2) 952, 955; Philadelphia & R. Ry. Co. v. Eisenhart (3rd Cir.), 280 F. 271, 276, certiorari denied 260 U. S. 723, 67 L. Ed. 482; Philadelphia & R. Ry. Co. v. Auchenbach (3rd Cir.), 16 F. (2) 550, 552, certiorari denied 273 U. S. 761, 71 L. Ed. 878.

In **Philadelphia & R. Ry. Co. v. Auchenbach** (3rd Cir.), 16 F. (2) 550, 552, the Court said:

> "The statute made it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, couplers that will couple automatically by impact. That duty is absolute and unqualified and contemplates the maintenance of

such appliances in working condition 'at all times.' P. & R. R. Co. v. Eisenhart (C. C. A.), 280 F. 271, 276, and cases cited. The test of the observance of this duty is the performance of the appliances. **'The failure of a coupler to work at any time sustains a charge that the Act has been violated.'** St. L., I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061; C., B. & Q. R. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582; San Antonio & Arkansas P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110; Chicago, R. I. & Pac. Ry. Co. v. Brown, 229 U. S. 317, 320, 33 S. Ct. 840, 57 L. Ed. 1204." (Emphasis supplied.)

In the recent case of **Myers v. Reading Co.**, 331 U. S. 477, 91 L. Ed. 1615, this Court recognized the soundness of the doctrine of the Auchenbach case and other cases of like tenor.

In **Atchison, Topeka & Santa Fe R. Co. v. Keddy**, 28 F. (2) 952, 955, the Court of Appeals for the Ninth Circuit sustained the giving of an instruction charging the jury that it was the absolute duty of the defendant to equip the car with a coupler that would work automatically by rise of the lift pin lever at all times, and that, **if they found that the coupler failed to operate at the time and place of the accident**, and that the plaintiff in the performance of his duty went in between the cars to operate the same, and was thereby injured, **it was immaterial whether the coupler was operated prior to or after the occurrence of the accident.**

III.

And following that portion of its opinion last referred to above, the Court of Appeals, in further criticism and condemnation of the trial court's charge, said:

"Where reliance for the proof of the ultimate fact rests entirely on circumstantial evidence, it is ordinarily essential that the effect of the evidence and its proper use be explained. That is not only true in res ipsa cases but is especially true in cases such as this where only one circumstance is relied upon to support the inference" (R. 211).

We respectfully submit that this is a novel and utterly untenable theory in a case involving the coupler provision of the Safety Appliance Act. With the coupler on the Pennsylvania car properly prepared for coupling to the Rock Island car, the legal effect of the proof that the cars failed to couple automatically by impact was to establish a violation of the statute. Proof of the failure of these couplers to couple automatically by impact, after having been properly prepared for coupling, may not be treated as mere circumstantial evidence of the violation of the statute. It constituted, as said above, direct proof that **respondent was then and there hauling on its line a car not equipped with couplers coupling automatically by impact.**

And it follows that Judge Hulen's charge may not be lawfully condemned on the ground that it failed to explain "the effect of the evidence and its proper use." Since the trial court properly and time and again instructed the jury as to the ultimate issue of fact, there was no occasion for any further explanation of the legal effect of the proof mentioned. The trial court in its charge made all the explanation necessary or proper under the law.

It appears that the error into which the Court of Appeals fell in this connection resulted from its failure to distinguish this case, **one involving an alleged violation of a mandatory duty imposed by statute,** from a case involving a charge of ordinary negligence.

In this connection we note that the Court in the early part of its opinion (R. 204) said:

> "The parties are in agreement that the failure of the Pennslyvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.'"

This does not correctly indicate petitioner's position below. Petitioner's position has always been that proof of the failure of the Pennsylvania car to couple to the Rock Island car automatically on impact, after the coupler of the Pennsylvania car had been prepared for coupling, constituted direct proof of a violation of the statute.

IV.

The Court of Appeals's criticism of the argument of plaintiff's counsel that "the plaintiff's duty is satisfied so long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact" (R. 137) and the Court's criticism of portions of the charge in that connection (R. 211) have been fully considered in subdivision (4) of petitioner's petition for the writ, pages 24 and 25, supra. For the reasons there stated, which need not be repeated here, the Court's criticism of the argument and the portions of the charge referred to in that connection was, we submit, wholly unwarranted.

V.

Petitioner earnestly contends that the rulings of the Court of Appeals complained of herein are utterly unsound and constitute a novel and unprecedented theory as to the character of the charge that should be given to the jury

in the trial of a case involving the alleged violation of the Safety Appliance Act. We submit that in this case the District Court's charge is entirely sound and unassailable, and that consequently the judgment of that court should be affirmed. It is pertinent, however, to inquire what would be the situation if the District Court were required to retry this case with the opinion of the Court of Appeals standing as it does.

If this decision should become the law of this case, the District Court, on a new trial, could not frame a charge to the jury under and in accordance with the law, long ago established by this Court and recently reaffirmed in **Myers v. Reading Co.**, supra (331 U. S. 477), that proof of the failure of a coupler to function efficiently at any time so as to effect a coupling automatically by impact constitutes proof that the carrier was then and there using on its line a car not equipped with couplers coupling automatically by impact. Under this opinion the District Court would be bound to undertake, by its instructions, to make some "explanation of the legal effect of this proof and the permissible use which the jury could make of it" and to fashion such instructions after the pattern of those normally given in negligence cases where proof of negligence rests solely upon circumstantial evidence. We submit that no proper charge could thus be given. And we further submit that any attempt by the District Court to thus follow this opinion in charging the jury on a new trial of this case would be bound to result in the utmost confusion in the minds of the jurors as to what facts should be found by them in order to entitle petitioner to a verdict.

And by the same token, the opinion of the Court of Appeals, if permitted to stand, would operate in other cases to deprive railroad workers of jury trials under and in

accordance with the terms and provisions of the Safety Appliance Act as construed by a long line of decisions of this Court, and thereby take away from such workers a goodly portion of the relief that Congress has afforded them.

In such a situation the writ should issue. **Delk v. St. Louis & S. F. R. Co.**, 220 U. S. 580, 55 L. Ed. 311, 314.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment herein of the United States Court of Appeals for the Eighth Circuit be reversed, and that the judgment of the District Court herein be affirmed.

Respectfully submitted,

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